

MAY 20 2003

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

Federal Communications Commission
 Office of Secretary

| | | |
|--------------------------------------|---|----------------------------|
| In the Matter of |) | EB DOCKET NO. 03-96 |
| |) | |
| NOS COMMUNICATIONS, INC., |) | File No. EB-02-TC-119 |
| AFFINITY NETWORK INCORPORATED |) | |
| and NOSVA LIMITED PARTNERSHIP |) | NAL/Acct. No. 200332170003 |
| |) | |
| Order to Show Cause and Notice of |) | FRN: 0004942538 |
| Opportunity for Hearing |) | |

To: The Commission

**ENFORCEMENT BUREAU'S MOTION TO STRIKE AND OPPOSITION TO
 PETITION FOR RECONSIDERATION**

1. On May 7, 2003, NOS Communications, Inc., Affinity Network Incorporated and NOSVA Limited Partnership (collectively, the "Companies") filed a consolidated Petition for Reconsideration (the "Petition") of the Commission's *Order to Show Cause and Notice of Opportunity for Hearing* (the "OSC/NOH") in the above-captioned proceeding.¹ The Chief, Enforcement Bureau, by his attorneys and pursuant to section 1.106(g) of the Commission's rules,² submits this Motion to Strike and Opposition to the Petition. As demonstrated herein, because the Petition is unauthorized by the rules, the filing should be dismissed without consideration by the Commission.

¹ FCC 03-75, EB Docket No. 03-96 (released April 7, 2003).

² 47 C.F.R. 1.106(g). The Bureau's instant pleading is timely filed. See 47 C.F.R. 1.4(h).

No. of Copies rec'd
 List ABCDE

0+14

2. The Companies urge the Commission to reconsider the *OSC/NOH* and name them as “respondents” in the above-captioned proceeding. In addition, they maintain that the Commission should vacate the *OSC/NOH* because the FCC “lacks jurisdiction to proceed against them” and their principals. Specifically, they maintain that the Commission does not possess: (a) authority to revoke a carrier’s authorization issued under section 214 of the Communications Act of 1934, as amended (the “Act”); (b) authority to proceed under section 312(b) of the Act; (c) authority to enjoin their principals from future misconduct; or (d) authority to issue a notice of apparent liability for a forfeiture under section 503(b) of the Act.

3. Section 1.106(a) of the Commission’s rules generally prohibits the filing of a petition for reconsideration of a hearing designation order. Such petitions may be submitted only under very limited circumstances. Specifically, section 1.106(a)(1) provides that “[a] petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner’s participation in the proceeding.”³ The Commission has consistently enforced this provision of its rules, repeatedly dismissing as unauthorized petitions for reconsideration of hearing designation orders not predicated on an adverse ruling relating to the petitioner’s participation in the subject hearing.⁴ This limitation exists for good reason: “to ensure the orderly conduct of hearings and to prevent the disruption and delay that would be caused by

³ 47 C.F.R. 1.106(a)(1).

⁴ See, e.g., *Family Broadcasting, Inc.*, 16 FCC Rcd 12801 (2001); *James A. Kay, Jr.*, 13 FCC Rcd 16369 (1998); *James A. Kay, Jr.*, 11 FCC Rcd 5324 (1996); *James A. Kay, Jr.*, 11 FCC Rcd 5324 (1996); *Trinity Broadcasting of Florida, Inc.*, 9 FCC Rcd 2567 (1994); *Coast TV, et al.*, 5 FCC Rcd 2751 (1990).

routinely entertaining requests for interlocutory relief.”⁵

4. Because the *OSC/NOH* constitutes an “order designating a case for hearing,” the Commission may consider the subject Petition only to the extent that it raises issues related to an adverse ruling within the *OSC/NOH* with respect to the Companies’ participation in the subject proceeding. The *OSC/NOH* contains no such “ruling.” The Companies’ claim that the *OSC/NOH* impermissibly denied them party status in the captioned hearing⁶ does not withstand scrutiny. A fair reading of the *OSC/NOH* confirms that the Commission has afforded the Companies their right to a hearing on the designated issues and did, in fact, make the Companies parties to the instant proceeding.⁷ To that end, the names of the Companies appear prominently in the caption at page 1 of the *OSC/NOH*.⁸ Footnote 1 of the *OSC/NOH* defines the term “NOS/ANI,” used throughout the document, to include each of the Companies.⁹ In addition, the Companies and the activities in which they engaged are described and discussed extensively at paragraphs 3-23 of the document.¹⁰ Furthermore, each of the three hearing issues designated at paragraph 27 relates to and directly implicates

⁵ *James A. Kay, Jr.*, 13 FCC Rcd 16369 (1998); *see also*, *ITC World Communications, Inc.*, 86 FCC 2d 31, ¶ 4 (CCB, 1981).

⁶ Petition, p. 3.

⁷ To the extent the Commission believes it appropriate, it may clarify that it intended in the *OSC/NOH* to make the Companies parties to the captioned proceeding. However, the Bureau believes that such clarification is unnecessary in light of the Companies’ inclusion in the *OSC/NOH* as described above which belies any suggestion that the *OSC/NOH* somehow failed to bestow upon the Companies party status in this proceeding.

⁸ *OSC/NOH*, at p. 1.

⁹ *OSH/NOH*, at n. 1.

¹⁰ *OSH/NOH*, at pp. 3-23.

the Companies.¹¹ Finally, the ordering clause at paragraph 29 directing the parties to file notices of appearance explicitly notifies the Companies that, if the Companies fail to file a written appearance within the time specified, they will forfeit their right to a hearing.¹²

5. The absence in the *OSC/NOH* of an “adverse ruling” as to the Companies’ participation is most eloquently demonstrated by the fact that, on May 7, 2003, the same day that respective counsel for the Companies filed with the Commission their Petition claiming confusion as to whether the Companies could participate in the hearing, the same counsel filed with the Presiding Judge pleadings styled “Notice of Appearance, or, in the Alternative, Petition to Intervene.” Whether the Companies participate in the proceeding by virtue of their notices of appearance or through intervention, the inescapable fact is that the *OSC/NOH* contains no ruling barring their participation. Indeed, in light of the focus of the designated issues, the Bureau fully expects and welcomes their participation as parties, as clearly contemplated by the Commission in the *OSC/NOH*.¹³

6. Review of the remainder of the Petition leads to the conclusion that the Companies have concocted their “adverse ruling” argument as a means by which to improperly and prematurely appeal the *OSC/NOH* to the Commission in an effort to evade

¹¹ *OSH/NOH*, at ¶ 27.

¹² *OSH/NOH*, at ¶ 29 (“If NOS Communications, Inc, Affinity Network Incorporated, and NOSVA Limited Partnership fail to file a written appearance within the time specified, NOS Communications, Inc, Affinity Network Incorporated, and NOSVA Limited Partnership’s right to a hearing SHALL DEEMED TO BE WAIVED.”).

¹³ For the same reason that there is no need for the Commission to grant reconsideration and amend the *OSC/NOH* to afford the Companies party status, the Bureau believes it unnecessary for the Presiding Judge to grant the Companies’ requests for intervention. If the Presiding Judge believes otherwise, however, he should indeed grant the Companies’ requests, an action to which the Bureau consents.

responsibility for their apparent misconduct. Thus, the bulk of the Petition is devoted to their argument that the Commission lacks the requisite authority to sanction them for any wrongdoing. This effort must also fail. Even if the *OSC/NOH* did bar the Companies' participation (which it clearly does not), by operation of section 1.106(a)(1), their Petition could only be considered "insofar as" it relates to such a ruling.¹⁴ The arguments questioning the Commission's authority that comprise the remainder of the Petition fall well outside of the limited scope of review permitted by the rule. The Commission should not allow the Companies to bootstrap substantive claims (that may first be raised, if at all, in exceptions to an initial decision) by their disingenuous and meritless "adverse ruling" argument.¹⁵

7. Even assuming, *arguendo*, that the Companies have appropriately raised additional arguments not relating to their participation in the hearing in their Petition for Reconsideration of the *OSC/NOH*, none of those claims has any legal basis. First, there is no merit to the Companies' contention that the Commission would lack the authority, after a

¹⁴ 47 C.F.R. § 1.106(a)(1).

¹⁵ The Companies also maintain that, notwithstanding section 1.106(a)(1), their "challenge" of the "Commission's jurisdiction to proceed against them. . . is timely." Their reliance on *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1303 (9th Cir. 1975), *aff'd*, 430 U.S. 519 (1977), which involved a judicial decision relating to the packaging and weighing of bacon, is misplaced because the decision has nothing to do with the Commission's processes. Also misplaced is the Companies' reliance on *Westel Samoa, Inc.*, 13 FCC Rcd 6342 (1998). In that anomalous case, the Commission entertained a petition for reconsideration of a hearing designation order filed by an individual who was named as a party in the order, but was not a Commission licensee, applicant or regulatee. Even if, in ruling on (and ultimately rejecting) the petitioner's argument that the FCC had no jurisdiction over him, the Commission somehow created a narrow exception to section 1.106(a)(1)'s strict limitation, the instant Petition does not fairly raise a jurisdictional issue. Despite the Companies' styling of its arguments as jurisdictional ones, its contentions are, in fact, challenges to the Commission's authority to take specific actions against them if the evidence adduced at hearing so warrants *e.g.*, to revoke a section 214 authorization. The Companies do not question the Commission's jurisdiction over them. Indeed, by the Companies' instant request that they be afforded party status and by their filing of notices of appearance or, in the alternative petitions to intervene, the Companies have conceded the jurisdiction of the Commission over them. Their protestations about Commission jurisdiction are, therefore, disingenuous.

full and fair hearing resolved against them, to revoke their section 214 authorization.

Section 4(i) of the Act grants the Commission broad authority to perform acts necessary to the execution of its functions.¹⁶ Where the Commission may grant authority to a licensee or regulate its operations, it may certainly withdraw that authority or otherwise take action necessary to prevent illegal practices by operators that are harmful to the public. Indeed, in deciding to grant blanket 214 authority to carriers, the Commission explicitly reserved its power to rescind such authority if a carrier engages in abusive practices against the public. “[W]ith blanket authority, unlike forbearance, we retain the ability to stop extremely abusive practices against consumers *by withdrawing the blanket section 214 authorization* that allows the abusive carrier to operate.”¹⁷ To find that the Commission has no such authority would render the agency powerless to take action against licensees that have engaged in egregious misconduct in violation of the Act and the rules, and that have abused their public trust. Clearly, Congress could not have intended to hamstring the Commission in a manner that would prevent it from carrying out its fundamental regulatory responsibilities pursuant to section 4(i). Significantly, the Companies do not cite in their Petition to any statute, precedent or rule that in any way refutes the Commission’s authority to revoke a carrier’s section 214 authority under such circumstances.

8. Second, there is no merit to the Companies’ contention that the Commission lacks legal authority to proceed here under section 312(b) of the Act. The ordering clauses

¹⁶ “The Commission may perform any all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i).

¹⁷ *Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43*, 14 FCC Rcd 11,364, 11,372 ¶ 12 (1999) (emphasis added); *see also CCN, Inc., et al.*, 13 FCC Rcd 13599 (1998), revoking a carrier’s section 214 authority for numerous violations of the Act and rules.

contained in paragraphs 26 and 27(c) of the *OSC/NOH* with which the Companies take issue, do not, as the Companies suggest, contemplate the imposition of an order that would bar their principals from engaging in otherwise lawful behavior. To the contrary, the ordering clauses require the Presiding Judge to conduct a hearing to inquire, *inter alia*, whether the Companies' principals violated the Act or the rules. If, and only if, he finds that the principals engaged in such illegal conduct does the ordering clause direct the Presiding Judge to consider whether to order the principals to cease and desist from providing common carrier service *without prior Commission consent, i.e., to cease and desist from violating the law*. Consequently, the ordering clauses contemplate that Company principals found to have engaged in such improper conduct would not necessarily be barred from obtaining section 214 authority; they would only be required to apply for and obtain specific approval, rather than being entitled to operate under "blanket" authority.

9. Third, there is no merit to the Companies' claim that the Commission cannot so enjoin the Companies' principals. The Commission's authority to issue a cease and desist order against an individual or individuals is derived from section 312(c) of the Act, which plainly contemplates a hearing proceeding against a "person" before the issuance of a cease and desist order.¹⁸

10. Finally, the Companies' claim that the Commission lacks authority under section 503(b) of the Act to impose a forfeiture for violation of section 201(b) of the Act is similarly premised on a distorted reading of the pertinent provisions of the law. Section

¹⁸ 47 U.S.C. § 312(c).

503(b)(1) contains an exception which states, in pertinent part, that a forfeiture penalty cannot be imposed for “any conduct which is subject to forfeiture under title II”

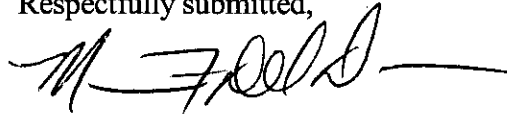
Pursuant to this exception, the Commission may not rely on section 503(b) to impose a forfeiture for a violation of a section within Title II of the Act, if that Title II section already contains independent forfeiture-enabling language. Indeed, in implementing section 503(b), the Commission explicitly identified the statutory provisions to which the section 503(b)(1) exception applies. Section 201 is not on the list.¹⁹ Because section 201(b) does not contain any forfeiture-enabling language, and the exception contained in section 503(b) relates only to those Title II sections that do, it is clear that the exception in section 503(b) does not bar the Commission from imposing a forfeiture under section 503(b) for conduct that violates section 201(b). Consequently, the *OSC/NOH*, at paragraph 30, appropriately directed the Presiding Judge to determine, pursuant to section 503(b) of the Act, whether a forfeiture should be issued for violation of section 201(b) of the Act.

11. In light of the foregoing, because the Companies’ attempt to appeal the *OSC/NOH* is not authorized by the Commission’s rules and the arguments contained therein

¹⁹ See section 1.80(a) of the rules, 47 C.F.R. § 1.80(a), which sets forth the specific sections of the Act to which the exception applies.

are without merit, the Petition should be stricken or dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Del Duca', followed by a horizontal line.

Maureen F. Del Duca, Chief
Gary Schonman
Hillary DeNigro
Donna Cyrus

Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Suite 3-B443
Washington, DC 20554
(202) 418-1420

May 20, 2003

CERTIFICATE OF SERVICE

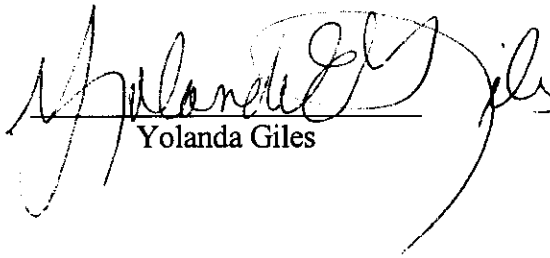
I, Yolanda Giles, a staff assistant in the Investigations & Hearings Division of the Enforcement Bureau, Federal Communications Commission, do hereby certify that, on May 20, 2003, a copy of the foregoing "Enforcement Bureau's Opposition to Petition for Reconsideration" was mailed by First Class United States Mail to the following:

Honorable Arthur I. Steinberg*
Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Rm. 1-C861
Washington, D.C. 20554

Danny E. Adams, Esq.
Kelley Drye & Warren LLP
8000 Towers Crescent Drive, Suite 1200
Vienna, VA 22182

(Counsel for Affinity Network, Inc., NOSVA Limited Partnership and the Principals of Affinity Network, Inc. and NOSVA Limited Partnership and NOS Communications, Inc.)

Russell D. Lukas, Esq.
Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street, N.W., Suite 1200
Washington, DC 20036
(Counsel for NOS Communications, Inc.)


Yolanda Giles

* By Hand